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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 JOHN A. BAX,

11 Plaintiff,

12 v.

13 NANCY A. BERRYHILL, Deputy
14 Commissioner of the Social Security
Administration for Operations,

15 Defendant.
16

CASE NO. 3:17-CV-05245-JRC

ORDER ON PLAINTIFF'S
COMPLAINT

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18 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
19 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.
20 Magistrate Judge and Consent Form, Dkt. 5; Consent to Proceed Before a United States
21 Magistrate Judge, Dkt. 6). This matter has been fully briefed. *See* Dkt. 13, 17, 18.

22 After considering and reviewing the record, the Court concludes that the ALJ
23 erred when evaluating the medical evidence regarding plaintiff's post traumatic stress
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1 disorder (“PTSD”). The ALJ found that one of the examining clinical psychologists had
2 conducted “extensive testing,” and had provided conclusions that are supported by such
3 testing, as well as being supported by the doctor’s “significant supporting explanations.”
4 AR. 75. However, the ALJ singled out and failed to credit fully one particular opinion
5 with a conclusory finding that the clinical psychologist’s one opinion “substantially
6 overstates the claimant’s limitations in this area.” *Id.* The ALJ does not offer any reason
7 as to why he believes that the clinical psychologist’s opinion regarding this one particular
8 limitation is a substantial overstatement of plaintiff’s limitations. This is a legal error.
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10 Because this error is not harmless, as fully crediting it could lead a reasonable ALJ
11 to a finding of disability, this matter is reversed and remanded to the Administration for
12 further proceedings consistent with this Order.

13 BACKGROUND

14 Plaintiff, JOHN A. BAX, was born in 1965 and was 37 years old on the alleged
15 date of disability onset of September 1, 2002. *See* AR. 221-26, 227-33. Plaintiff has his
16 GED and is certified in hazmat/bio-hazmat cleanup. AR. 89.

17 According to the ALJ, plaintiff has at least the severe impairment of “post-
18 traumatic stress disorder (PTSD) (20 CFR 404.1520(c) and 416.920(c)).” AR. 50.

19 At the time of the hearing, plaintiff was living with a roommate. AR. 89.

20 PROCEDURAL HISTORY

21 Plaintiff’s applications for disability insurance benefits (“DIB”) pursuant to 42
22 U.S.C. § 423 (Title II) and Supplemental Security Income (“SSI”) benefits pursuant to 42
23 U.S.C. § 1382(a) (Title XVI) of the Social Security Act (“the Act”) were denied initially
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1 and following reconsideration. *See* AR. 112, 113, 151, 152. Plaintiff's requested hearing
2 was held before Administrative Law Judge S. Andrew Grace ("the ALJ") on April 14,
3 2015. *See* AR. 85-111. On August 21, 2015, the ALJ issued a written decision in which
4 he concluded that plaintiff was not disabled pursuant to the Act. *See* AR. 45-84.

5 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Whether the
6 ALJ properly evaluated the medical evidence; (2) plaintiff's testimony; (3) the lay
7 evidence; (4) plaintiff's residual functional capacity (RFC), past relevant work, and the
8 steps four and five findings; and (5) Whether the new evidence submitted to the Appeals
9 council shows that the ALJ's decision is not supported by substantial evidence and/or that
10 it is based on legal error. *See* Dkt. 13, p. 1.

12 STANDARD OF REVIEW

13 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
14 denial of social security benefits if the ALJ's findings are based on legal error or not
15 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
16 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
17 1999)).

18 DISCUSSION

19 **(1) Whether the ALJ properly evaluated the medical evidence.**

20 Among other things, plaintiff contends that the ALJ erred when failing to include
21 all the opinions from examining doctor, Dr. Todd D Bowerly, Ph.D., regarding plaintiff's
22 limitations into plaintiff's residual functional capacity ("RFC"). *See* Dkt. 13, pp. 2-7.

23 Defendant contends that there is no error. *See* Dkt. 17.
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1 On May 22, 2015, Dr. Bowerly examined plaintiff, performed “extensive testing,”
2 and diagnosed plaintiff with PTSD. *See* AR. 669; *see also* AR. 75. Among other
3 opinions, Dr. Bowerly opined that plaintiff suffered from marked limitations in the ability
4 to respond appropriately to usual work situations and changes in a routine work setting,
5 based on plaintiff’s PTSD. AR. 673.

6 The ALJ gave significant weight to Dr. Bowerly's opinions, generally, finding that
7 they "are supported by the extensive testing of the claimant he performed and significant
8 supporting explanations.” *See* AR. 75. However, the ALJ did not credit fully the opinion
9 from Dr. Bowerly that plaintiff suffered from marked limitations in the ability to respond
10 appropriately to usual work situations and changes in a routine work setting. *See id.*; *see*
11 *also* AR. 673.

12 When an opinion from an examining doctor is contradicted by other medical
13 opinions, the examining doctor’s opinion can be rejected only “for specific and legitimate
14 reasons that are supported by substantial evidence in the record.” *Lester v. Chater*, 81
15 F.3d 821, 830-31 (9th Cir. 1996) (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir.
16 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)); *see also* 20 C.F.R. §§
17 404.1527(a)(2) (“Medical opinions are statements from physicians and psychologists or
18 other acceptable medical sources that reflect judgments about the nature and severity of
19 your impairment(s), including your symptoms, diagnosis and prognosis, what you can
20 still do despite impairment(s), and your physical or mental restrictions”).

21 Here, when failing to credit fully the opinions from Dr. Bowerly, the ALJ
22 indicated that this opinion “substantially overstates the claimant’s limitations in this
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1 area.” AR. 75. However, the ALJ does not offer any rationale in support of this
2 conclusion, but instead, simply makes the conclusory statement.

3 According to Social Security Ruling (“SSR”) 96-8p, a residual functional capacity
4 assessment by the ALJ “must always consider and address medical source opinions. If the
5 RFC assessment conflicts with an opinion from a medical source, the adjudicator must
6 explain why the opinion was not adopted.” *See* SSR 96-8p, 1996 SSR LEXIS 5 at *20.
7 Although “Social Security Rulings do not have the force of law, [n]evertheless, they
8 constitute Social Security Administration interpretations of the statute it administers and
9 of its own regulations.” *See Quang Van Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir.
10 1989) (*citing Paxton v. Sec. HHS*, 865 F.2d 1352, 1356 (9th Cir. 1988); *Paulson v.*
11 *Bowen*, 836 F.2d 1249, 1252 n.2 (9th Cir. 1988)) (internal citation and footnote omitted).
12 As stated by the Ninth Circuit, “we defer to Social Security Rulings unless they are
13 plainly erroneous or inconsistent with the [Social Security] Act or regulations.” *Id.* (*citing*
14 *Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984); *Paxton, supra*, 865 F.2d
15 at 1356) (footnote omitted). Here, this Ruling that an ALJ must explain why a medical
16 opinion is not adopted into a RFC is not plainly erroneous or inconsistent with the Social
17 Security Act or regulations.
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19 The ALJ erred by failing to explain why he did not adopt Dr. Bowerly's opinion
20 regarding plaintiff’s marked limitations in the ability to respond appropriately to usual
21 work situations and changes in a routine work setting. *See id.* Making a conclusion is not
22 the same thing as providing an explanation.
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1 Defendant relies on the note from the ALJ that plaintiff's "concerns, so far as they
2 are valid, have been addressed by limiting the claimant's [RFC] to simple, routine,
3 repetitive tasks in low-stress work." AR. 75.

4 The Ninth Circuit has "recognized that harmless error principles apply in the
5 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
6 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
7 Cir. 2006) (collecting cases)). The Ninth Circuit has reaffirmed the explanation in *Stout*
8 that "ALJ errors in social security are harmless if they are 'inconsequential to the ultimate
9 nondisability determination' and that 'a reviewing court cannot consider [an] error
10 harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting
11 the testimony, could have reached a different disability determination.'" *Marsh v. Colvin*,
12 792 F.3d 1170, 1173 (9th Cir. 2015) (citing *Stout*, 454 F.3d at 1055-56). The court further
13 indicated that "the more serious the ALJ's error, the more difficult it should be to show
14 the error was harmless." *Id.* at 792 F.3d 1170 (noting that where the ALJ did not even
15 mention a doctor's opinion that plaintiff was "pretty much nonfunctional," it could not
16 "confidently conclude" that the error was harmless) (citing *Stout*, 454 F.3d at 1056;
17 *Bowen v. Comm'r of Soc. Sec.*, 478 F.3d 742, 750 (6th Cir. 2007)). In *Marsh*, even
18 though "the district court gave persuasive reasons to determine harmlessness," the Ninth
19 Circuit reversed and remanded for further administrative proceedings, noting that "the
20 decision on disability rests with the ALJ and the Commissioner of the Social Security
21 Administration in the first instance, not with a district court." *Id.* (citing 20 C.F.R. §
22 404.1527(d)(1)-(3)).
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1 Here, the question is whether the failure to credit fully an opinion from an
2 examining doctor that plaintiff suffers from marked limitations in the ability to respond
3 appropriately to usual work situations and changes in a routine work setting is harmless
4 because this opinion sufficiently is accommodated by limitation to “simple, routine,
5 repetitive tasks in low-stress work.” AR. 75. However, just because the tasks that a
6 worker must perform are simple, routine, and repetitive, does not mean that there will not
7 be changes in the work *setting* or that there will not be work situations that require an
8 appropriate response. Therefore, the Court cannot conclude with confidence that no
9 reasonable ALJ, when fully crediting [Dr. Bowerly’s opinion], could have reached a
10 different disability determination.” *Marsh*, 792 F.3d at 1173 (citing *Stout*, 454 F.3d at
11 1055-56). Therefore, the error is not harmless.

13 Defendant contends that the ALJ also relied on plaintiff’s activities, including
14 volunteering, when failing to credit fully Dr. Bowerly’s opinion regarding marked
15 limitations. *See* Dkt. 17, p. 7. However, the ALJ’s written decision indicates no reliance
16 on this factor when discussing Dr. Bowerly’s opinion. *See* AR. 75.

17 According to the Ninth Circuit, “[l]ong-standing principles of administrative law
18 require us to review the ALJ’s decision based on the reasoning and actual findings
19 offered by the ALJ - - not *post hoc* rationalizations that attempt to intuit what the
20 adjudicator may have been thinking.” *Bray v. Comm’r of SSA*, 554 F.3d 1219, 1225-26
21 (9th Cir. 2009) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (other citation
22 omitted)); *see also Molina v. Astrue*, 674 F.3d 1104, 1121 (9th Cir. 2012) (“we may not
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1 uphold an agency's decision on a ground not actually relied on by the agency") (citing
2 *Chenery Corp, supra*, 332 U.S. at 196).

3 Although the ALJ discussed this factor of volunteering when failing to credit Dr.
4 Morgan's opinion, in contrast to defendant's implication that the ALJ relied on it when
5 failing to credit fully Dr. Bowerly's opinion, the ALJ instead indicated that "Dr.
6 Bowerly's opinions on the claimant's abilities are altogether more consistent . . . with
7 the claimant's admissions concerning his activities and friends of the Carpenter." AR. 75.
8 Therefore, it is not logical that the ALJ then contradicted himself to find that Dr.
9 Bowerly's opinions on the claimant's abilities are not consistent with plaintiff's
10 volunteering with his church.
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12 Therefore, for the reasons stated and based on the record as a whole, this matter is
13 reversed and remanded to the Administration for further proceedings, as requested by
14 plaintiff. *See* Dkt. 18, p. 10.

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16 **(2) Whether the ALJ properly evaluated plaintiff's testimony and the lay
evidence.**

17 The Court already has concluded that the ALJ erred in reviewing the medical
18 evidence and that this matter should be reversed and remanded for further consideration,
19 *see supra*, section 1. In addition, the evaluation of a claimant's statements regarding
20 limitations relies in part on the assessment of the medical evidence. *See* 20 C.F.R. §
21 404.1529(c); SSR 16-3p, 2016 SSR LEXIS 4. Therefore, plaintiff's testimony and
22 statements should be assessed anew following remand of this matter. Similarly, the lay
23 evidence should be evaluated anew following remand of this matter.
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1 (3) Whether the ALJ properly assessed plaintiff's RFC, improperly
2 determined plaintiff's past relevant work, and erred by basing his step
3 four and five findings on his erroneous RFC assessment; and whether
4 the new evidence submitted to the Appeals Council shows that the
5 ALJ's decision is not supported by substantial evidence and/or that it is
6 based on legal error.

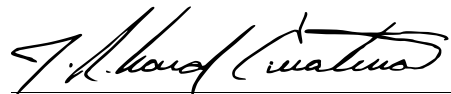
7 Similarly, the RFC, as well as the remainder of the sequential disability evaluation
8 procedure should be evaluated anew following remand of this matter, as should the new
9 evidence submitted to the Appeals Council.

10 CONCLUSION

11 Based on the stated reasons and the relevant record, the Court **ORDERS** that this
12 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
13 405(g) to the Acting Commissioner for further consideration consistent with this order.

14 **JUDGMENT** should be for plaintiff and the case should be closed.

15 Dated this 6th day of April, 2018.

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17 J. Richard Creatura
18 United States Magistrate Judge
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